95-1715

No.

Supreme Court, U.S.
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In the Supreme Court
of the
United States

October Term 1995

Chris Brasseur
Petitioner,

vs.

Empire Travel Service, Inc., a corporation;
Empire Tours Incorporated, a corporation;
Compania Mexicana De Aviacion, S.A.
a foreign corporation
Companies 1 through 25;
and Does 1 through 100, inclusive
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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72 pp

QUESTION PRESENTED FOR REVIEW

WHERE Mexico vacation tour was purchased in California, and WHERE providers of said tour, a foreign airline as common carrier and a tour operator, had knowledge for over 6.5 hours prior to Flt. 943's departure from Guadalajara to Cancun of hurricane Gilbert and of the periodic Government hurricane "warnings" naming Cancun specifically as a likely impact site, and WHERE Gilbert was a class 5 hurricane, the most devastating, and WHERE a hurricane "warning" is the highest state of hurricane alert, and WHERE an American Government satellite photo of hurricane Gilbert, taken within four minutes of Flt. 943's arrival at Cancun on Sept. 13, 1988 at 4:05 p.m., clearly shows the leading edge of hurricane Gilbert already at Cancun, and WHERE an American passenger tourist boarding Flt. 943 after a 3.5 hour layover in Guadalajara had no knowledge of hurricane Gilbert or the Government hurricane Gilbert "warnings" due to being non-spanish speaking and due to having been in Mexico for 7 days prior to flying to Guadalajara, and WHERE said passenger tourist was refused admittance at her scheduled, beachfront hotel within approximately 1 hour of her arrival in Cancun due the increasing intensity of hurricane Gilbert, changing her status from tourist to evacuee, the question presented is:

Does a highest or utmost standard of care apply to discharging airline passengers at a destination site named specifically as being under an official Government "warning" for a class 5 hurricane, and does that standard of care include a duty to warn passenger tourists flying to a destination site named specifically as being under an official Government hurricane "warning", in order that said passengers may decide for themselves whether they want to be flown to and discharged at the site under "warning"?

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The petitioner, Chris Brasseur, prays that the Supreme Court grant a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit entered on December 15, 1995.

DECISION BELOW

The Memorandum Decision and Order denying rehearing and motion for reconsideration of the United

States Court of Appeals for the Ninth Circuit is not reported. The Memorandum affirmed the decision of the District Court.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered judgement December 15, 1995. The Court of Appeals denied a timely petition for rehearing and rejected suggestion for rehearing en banc on February 2, 1996. The Court of Appeals also denied timely motion for reconsideration on February 29, 1996. This Court has jurisdiction to review the judgement by writ of certiorari under 28 *U.S.C.* §1254(1). This Petition was timely filed pursuant to *Supreme Court Rule* 13(3), subsequent to the denial of rehearing filed February 2, 1996.

TREATY AND STATUTES PRESENTED FOR REVIEW

TREATY ON TOURISM (App. pg. 27)
TIAS 10821; 21 *UST* 1978, Agreement Between the United States of America and United Mexican States

Business and Professions Code §17550
Legislative findings and declarations (pg. 23)

California Business and Professions Code §17550.14
Failure to provide transportation or travel services; Refund (in pertinent part)
(a) In the event the transportation or travel services contracted for is not provided by a seller of travel and unless the passenger otherwise advises the seller of travel in writing, the seller of travel shall promptly return to the passenger all moneys paid for services not performed and goods not delivered in accordance with the contract.
(This statute became effective January 1, 1996)

California Civil Code §1668
Certain contracts unlawful
All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

California Civil Code §1710
Deceit, what (in pertinent part)
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact;

California Civil Code §1714
Responsibility for willful acts, negligence; contributory negligence (in pertinent part)
(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

California Civil Code §2100
General duties of carrier
A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.

STATEMENT OF THE CASE

This case was originally filed by Chris Brasseur and Elizabeth Oare (Oare is not a party to the Appeal or this Petition) in the Superior Court of San Francisco, California on September 8, 1989.

Subject matter jurisdiction in the United States District Court for the Northern District of California was premised on Compania Mexicana de Aviacion, S.A. (hereafter "Mexicana") being a foreign state, 28 *U.S.C.* §1330, with commercial activities, 28 *U.S.C.* §1602. The Mexican Government owned more than 50% of Mexicana Airlines at the time of the incident. Mexicana removed the action to the U.S. District Court on Oct. 25, 1989 pursuant to the Foreign Sovereign Immunities Act, 28 *U.S.C.* §1441(d).

A bifurcated trial for liability only was held before the Honorable Charles A. Legge, Judge. Issue of petitioner's loss and injury has not been before the District Court. The trial against defendant Empire Tours was by jury. The trial against defendant Mexicana Airlines was by advisory jury only, an action against a foreign state is to be tried without jury, 28 *U.S.C.* §1441(d).

Decision of the jury and advisory jury was against the petitioner. Motion for New Trial and Motion for Reconsideration was filed in the District Court. Both were denied.

A timely appeal was filed. Decision of the District Court was affirmed by the U.S. Court of Appeals for the Ninth Circuit. Petition for Rehearing with suggestion for rehearing en banc and Motion for Reconsideration was filed. Motions were denied. Motion for Stay of Mandate Pending Petition for Writ of Certiorari was denied. Mandate was filed February 26, 1996.

STATEMENT OF FACTS

This civil suit arose from a vacation tour package offered jointly by defendants' as advertised in their brochure (ER Vol.3, pg.8-10), and purchased by plaintiff under a California contract. Same acts or series of events are common to both defendants.

This suit was brought for loss and injury, physical and emotional, relating to plaintiff Chris Brasseur not being warned by Mexicana Airlines and Empire Tours, of Hurricane Gilbert's impending arrival at Cancun, Mexico, and for Mexicana Airlines discharging plaintiff at Cancun, literally into Hurricane Gilbert's leading edge where she was terrorized and put into a dangerous life threatening situation and was in a state of severe survival for four days. Category five storm is officially called "devastating" (ER Vol.1, No.171, pg.E-1). In Mexico 202 people were killed and more than sixty thousand homes were destroyed (ER Vol.3, pg.57).

Plaintiff was on a vacation tour. This was not point to point transportation. Final destination was San Francisco, CA. Once discharged from the Mexicana aircraft, plaintiff had nowhere to escape the hurricane. Cancun is located on the east coast of the Yucatan peninsula, on the beach, in an area of low elevation in a remote part of Mexico. Cancun is not in an area of the country where various means of transportation are readily available that could have provided an avenue of escape. Plaintiff was a tourist in an unfamiliar foreign country where she did not speak the language, where darkness was approaching, and where there was no available means of escape from the hurricane.

There was no contributory negligence on the part of the plaintiff (see ER supplemental transcript titled Jury Trial Excerpts, dated Dec. 8, 1993, pg. 29-31).

The only source of available information to the plaintiff on the hurricane was in the possession of

Mexicana Airlines and Empire Tours. It was their responsibility to warn the plaintiff and keep her out of the area under hurricane warning. The information regarding the hurricane warning was withheld from the plaintiff. Mexicana Airlines had the only means of escape, the aircraft the plaintiff flew in on.

Documents and testimony produced by Mexicana Airlines and Empire Tours shows they had knowledge of the hurricane before plaintiff departed from Guadalajara on Flight 943 on September 13, 1988.

Mexicana Airlines evidence shows they had knowledge of the hurricane warning 6 hours 40 min. before departure from Guadalajara, and 9 hours prior to appellant's arrival at destination airport (ER Vol.3, pg.38). Defendant Mexicana Airlines had in their possession, the official hurricane warning, when plaintiff walked on board the aircraft. They failed to give her that warning. At time plaintiff arrived at destination hurricane was officially called "extremely dangerous." Defendant airline's evidence shows they had knowledge of other tourists at Cancun who wanted to evacuate because of "fear" of the hurricane (ER Vol.3, pg.94).

A number of important facts of the case are outlined below as they determine the applicable law. Facts noted here are in the trial record of the case.

Facts Regarding Defendant Mexicana Airlines:

1. Mexicana Airlines pilot in command of Flight 943, September 13, 1988, testified he knew of the "hurricane warning" issued by the Government of Mexico for the Cancun area before flight departed for Cancun. (ER Vol.1, pg.64-65).

2. Pilot testified he was trained to follow Mexicana

Airline's policies set forth in its Flight Operations Manual (ER Vol.3, pg.80) (ER Vol.1, No.170, pg.33-34). Flight Operations Manual, in "Announcements to Passengers" requires pilot to announce "storms" (pg.38 & 39).

3. In announcing "storms" the Flight Operations Manual does not specify the "storm" must be within 20 miles or any other specific distance from the destination airport before the "storm" is announced to passengers (ER Vol.3, pg.80) (ER Vol.1, No.170, pg.40).

4. Weather report, Hurricane Gilbert Advisory No.15, produced by Mexicana Airlines indicates hurricane "warning" was issued for Cancun at 9 a.m. EDT (7 a.m. Cancun time), over 9 hours prior to plaintiff's arrival in Cancun (ER Vol.3, pg.87). Gilbert's course was straight.

5. Report (same as No.4 above) shows Mexicana Airlines had knowledge of other tourists at Cancun Airport who wanted to evacuate because of "fear" of the hurricane (ER Vol.3, pg.94). At the same time Mexicana Airlines was flying more unsuspecting tourists, including the plaintiff, into the same area under hurricane warning that other tourists wanted to evacuate.

6. Brochure produced by Empire Tours (ER Vol.3, pg.8-10) shows Mexicana Airlines not only invited plaintiff to go on their airplane but to go on their tour as Empire Tours, Mexicana Airlines joint tour brochure indicates. Headline on front of brochure states, "EMPIRE TOURS & MEXICANA AIRLINES offer CHARTER-LIKE PRICES to [...] Cancun from [...] SAN FRANCISCO." Final destination was San Francisco.

Facts Regarding Defendant Empire Tours:

1. Brochure from defendant states they are responsible for acts and omissions of their own employees (ER Vol.3,

pg.10).

2. Telex (ER Vol.3, pg.85) sent to Empire Tours from their supplier (company called VTC) in Cancun, Mexico. Telex states Cancun airport will be closed because of "WEATHER CONDITIONS." Telex has "URGENT URGENT URGENT" three times across the page. Telex was transmitted at 1118 PDT 09/13/88. Before plaintiff's arrival in Cancun Empire Tours had 3 hours and 47 minutes to warn the plaintiff of the hurricane.

3. Empire Tours president Gizelle Friedman testified as to their receipt of the telex (ER Vol.2, No.211, pg.21, 25, 26, 29 & 30) and that they were aware of a "huge storm" (pg.31 & 32).

4. Empire Tours president testified and acknowledged plaintiff was turned away from her hotel (ER Vol.2, No.211, pg.26) and was "transported to another place" and did not get her room (pg. 27).

Facts Regarding Plaintiff's Weather Bureau Records:

1. Plaintiff's U.S. National Weather Service records have the highest United States Government certification and are regarded as "probative evidence," *Aben v. District of Columbia*, 221 F.2d 110.

2. U.S. Weather report, Hurricane Gilbert Advisory No.15, same as one produced by Mexicana Airlines, (pg.7, No.4 above) indicates hurricane "warning" was issued "by the Government of Mexico" for Cancun at 9 a.m. EDT (7 a.m. Cancun time). Over 9 hours prior to plaintiffs arrival in Cancun. (ER Vol.3, pg.38 & 39).

3. Hurricane Gilbert Advisory No. 17 issued at 4 p.m. Cancun time, 4 minutes before plaintiff landed at Cancun, states, "PEOPLE IN THE WARNED AREAS SHOULD

HAVE COMPLETED ALL POSSIBLE PREPARATIONS FOR THIS EXTREMELY DANGEROUS HURRICANE" (ER Vol.3, pg.43). Advisory No. 17 also states, "[...] HURRICANE REACHED CATEGORY FIVE STRENGTH" (ER Vol.3, pg.42). Category five storm is officially called "devastating" (ER Vol.1, No.171, pg.E-1).

4. Pilot testified that, prior to landing at Cancun, he made a passenger announcement that the weather was "82 degrees and cloudy or partly cloudy" (ER Vol. No. 170, pg.62). The reference to "cloudy" indicates the clouds that appear above and surrounding Cancun on the satellite photograph, taken 4 min. before landing. The clouds are part of the hurricane as the photograph and expert testimony verify (ER Vol.3, pg.50) (ER Vol.2, No.210, pg.34-35). In pilot's announcement to passengers no mention was made of hurricane or hurricane warning.

5. Satellite photograph taken 4 minutes before plaintiff landed at Cancun shows clouds ("rain bands") of the hurricane extending over and beyond the Cancun area (ER Vol.3, pg.50). Surface analysis chart recorded one hour before the plaintiff landed shows hurricane low pressure area already effecting cancun. (ER Vol.3, pg.47).

6. Testimony of plaintiff's expert witness Russell Elsberry, Ph.D., meteorologist, stating, in reference to satellite photograph, "[...] rain bands had already passed Cancun [...]" before plaintiff landed (ER Vol.2, No.210, pg.34 - 35). Professor Elsberry testified that (one hour before plaintiff landed) surface analysis chart shows Cancun already being effected by the hurricane (ER Vol.2, No.210, pg.29 - 31).

7. Meteorologist testified it would take "32 to 36 hours" for the hurricane to pass a point (ER Vol.2, No. 210, pg.42).

8. The "eye," the center of the hurricane is not the storm. The "eye" is calm (ER Vol.1, No.171, pg.B-2).

9. Meteorologist testified that location of hurricane eye at 4 p.m. (when plaintiff landed) was 230 miles from Cancun (ER Vol. 2, No.210, pg.77) and that "gale force winds," with potential for damage extended out 225 miles from the eye (ER Vol.2, No.210, pg.19 - 20). Indicating "gale force winds" were only 5 miles away when plaintiff landed at Cancun.

10. The Yucatan, Cancun area of Mexico is an area frequented by hurricanes (ER Vol.3, pg.59-68).

Facts Regarding Memorandum from the Ninth Circuit:

1. The Ninth Circuit applied standard of "ordinary care" and affirmed that fate of passengers is in the hands of the airline and passengers will not receive official government hurricane warning unless the airline decides passengers will be in "immediate danger" after their arrival at the destination (App. pg.4 & 5). Theory of "immediate danger" was not an issue raised by either party at trial.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power.

The decision below is untenable and contrary to all parameters regarded as being within "public policy," or within the "public duty" for common carriers, as called for by this Court. *Northern P.R. Co. v. North Dakota ex rel. McCue*, infra (pg.14).

Decision of the Ninth Circuit is in direct conflict with State and Federal laws, applicable to this case. Common

carriers and tour operators are obligated by law to promote the safety of passengers and tourists. Hurricane warnings are intended for the benefit and protection of the public. A favorable decision by the Supreme Court would have a wide ranging effect and be a benefit to the general public in preventing further injury, and possibly death, in future disaster situations. Gilbert was so well-reported and so dangerous that a favorable decision would not justify later suits for unreported and insignificant threats at a destination site.

The dispute herein is the scope of the standard of care for an airline as common carrier. The Ninth Circuit has essentially ruled notice of hurricane warnings to passengers to be outside the parameters of duty of utmost or highest standard of care for airlines, and that hurricane warnings are discretionary and passenger will be informed only if the airline decides passenger will be in "immediate danger" (App. pg.4 & 5) upon arrival at their destination.

Although the body of law regarding common carriers is quite extensive there apparently are some areas i.e., regarding hurricane warnings, that are misunderstood and/or misapplied.

The petitioner contends there are no conditions as to when a hurricane warning is to be issued to the traveling public. If official hurricane warning has been issued for destination area or airport and airline fails to inform passengers on flight, and passenger is injured because of the hurricane, the omission of the hurricane warning is negligence. Passengers have a right to decide for themselves whether they want to fly to and be discharged into a hurricane "warning" area.

California law controls the substantive issues of this case, *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The Ninth Circuit review has not considered scope of State statutes in its context of whole

body of common and statutory law of State as it applies to the issues.

In California common carriers and tour operators are regulated by statute. Common carriers are under *Civil Code* §2100, tour operators and wholesalers are under *Business and Professions Code* beginning at §17550.

Listed below, "A" through "M," are the rights, duties, standards and obligations passengers on a common carrier, and clients of providers of tours, are entitled to under the law:

A. IN CALIFORNIA PASSENGERS OF COMMON CARRIER ARE ENTITLED TO "UTMOST" OR "HIGHEST" STANDARD OF CARE AS MANDATED BY STATUTE.

"***California Civil Code* §2100**
General duties of carrier: A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for the purpose, and must exercise to that end a reasonable degree of skill."

B. AIRLINE'S DUTY OF UTMOST CARE BEGINS WHEN PASSENGER APPEARS AT SITE OF DEPARTURE AND IS ACCEPTED BY AIRLINE AS TRAVELER.

Negligence of defendants' began at the check-in desk as the plaintiff was not warned of the hurricane at that time. Official government hurricane warning was in effect for the passenger's destination airport over 6 hours (ER Vol.3, pg.38) before passenger appeared at airline check-in desk and passenger had a right to be informed of hurricane warning. From *USAIR Inc. v. U.S. Dept. of Navy*, 14 F.3d 1410, 1411 (9th Cir. 1994):

"**11. Carriers**...under California law, common carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under the circumstances."

Pg. 1414: "USAIR's duty to its passengers was in force when (name) went to the site of departure and (airline) accepted him as a traveler."

C. THE NINTH CIRCUIT ERRONEOUSLY AFFIRMED STANDARD OF "ORDINARY" CARE INSTEAD OF "UTMOST" OR "HIGHEST" STANDARD OF CARE FOR PASSENGERS OF COMMON CARRIER.

Jury instruction imposing the duty of ordinary care (ER Vol.1, No.175, pg.55 & 56) (App. pg.24 & 25) to Mexicana Airlines thereby omitted "an essential principle of law," the rule of "utmost" care which may justify the granting of a new trial. In *Nance v. Fresno City Lines*, 113 P.2d 244, 246, the California Appellate Court stated:

"[1] These instructions disregard the rule establishing the degree of care required of common carriers of persons for hire as stated in Section §2100 of the Civil Code..."

D. STANDARD OF "ORDINARY" CARE, AS APPLIED BY THE COURT BELOW, DOES NOT APPLY TO "ACTIVE NEGLIGENCE" OR "PERSONAL TREATMENT OF PASSENGERS" BY THE CARRIER.

Failure to warn passengers of a hurricane prior to boarding or disembarking qualifies as active negligence. The court below erroneously applied the standard of ordinary care ("reasonable care") to Mexicana Airlines (ER Vol.1, No.175, pg. 55 & 56) (App. pg.3). "Reasonable care" and its application is defined in *Dayton v. Yellow Cab Co.*,

85 C.A.2d 740, 744; 193 P.2d 959:

> "[2] This rule of 'a reasonable degree of care.' however, refers primarily to the condition and maintenance of equipment or premises provided for use of passengers and cannot be interpreted as a relaxation of the rule of utmost care as it applies to active negligence or personal treatment of passengers by the carrier, its agents, or employees, while obligations under the contract or carriage are still unfulfilled. Such contract involves mutual rights and obligations the same as any other."

E. DUTY OF COMMON CARRIER IS A "PUBLIC DUTY," AND IN CALIFORNIA COMMON CARRIERS MUST "GUARD THE PASSENGER FROM DANGER" AND THIS "RESPONSIBILITY" IS A MATTER OF "PUBLIC POLICY."

In reference to general duties of a common carrier the Supreme Court of the United States in *Northern P.R. Co. v. North Dakota ex rel. McCue*, 236 U.S. 585, 59 L.ed. 735, 35 Sup. Ct. Rep. 429, 433 (1915) has ruled that:

> "...duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them" and states may prescribe rules "to promote safety" and "good order."

The Supreme Court of California in *Treadwell v. Whittier*, 22 Pac. 266, 271, 80 Cal. 588, Quoting, *Railroad v. Kennard* 21 Pa.St. 203 stated:

> "that the carrier is bound to guard the passenger from every danger which extreme vigilance can prevent."

The court continues, quoting *Meler v. Railroad Co.*, 64 Pa.St. 225:

"that the above expresses the true measure of responsibility."

The court, quoting *Taylor v. Railroad Co.*, 48 N.H. 314:

"Upon grounds of public policy, also the carrier of passengers is bound to exercise the highest degree of care and diligence."

"Public policy" is defined in *Black's Law Dictionary*, 6th Edition, pg. 1231. Dictionary gives reference to *Hammonds v. Aetna Cas. & Sur.Co.*, D.C. Ohio, 243 F.Supp. 793, 796 & 797 (in part):

"In substance it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well settled public opinion relating to man's pain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation."

F. UNDER CALIFORNIA LAW THE RELATIONSHIP BETWEEN A PASSENGER AND A COMMON CARRIER IS A "SPECIAL RELATIONSHIP" WHICH GIVES PASSENGER "RIGHT TO PROTECTION."

A traveler on common carrier ("public or private") is entitled to receive warning of hurricane as he is in a "special relationship" with the airline and is entitled to "protection" by the carrier. In reference to the special relationship between a carrier and its passengers, the California Supreme Court said in *Lopez v. Southern California Rapid Transit*, 221 Cal. Rptr. 840, 845(Cal. 1985):

> "...some relationships by their very nature are 'special' ones giving rise to an 'initial duty' to come to the aid of others, regardless of whether there has been detrimental reliance on a particular case. The relationship between a common carrier and its passengers is just such a special relationship, as is the relationship between an innkeeper and...guests, between a possessor of land and those who enter in response to...invitation and between a psychiatrist and ...patients."

A "special relationship" gives one a "right to protection." (*Lopez*, pg. 844, footnote No.5(b)).

G. DUTY OF AIRLINE TO "ACT" IS CREATED BY "SPECIAL RELATIONSHIP" WITH THE PASSENGER.

Plaintiff, as passenger, had a "special relationship" with Mexicana Airlines. Hurricane was foreseeable by the defendant and it was foreseeable that passenger would be placed in harms way if discharged at Cancun. Airline was negligent for failure to warn as the airline had knowledge of the hurricane warning (ER Vol.1, No.170, pg. 64) (ER Vol.3, pg. 87) and failed to "act" on that warning by informing the passengers. From, *De Vera v. Long Beach Pub. Transportation Co.*, 180 Cal.App. 3d 782, 783; 225 Cal.Rptr. 789 (May 1986):

> "...the court held that the trial court had properly concluded that defendant, as a common carrier, had a special relationship with plaintiff, as a passenger, giving rise to a duty to investigate and to assemble evidence for future civil litigation, given the foreseeability of the possibility of harm to passengers absent a failure to act."

H. AIRLINE FLIGHT OPERATIONS MANUAL CREATES A "POLICY" TO WARN PASSENGERS OF "STORMS."

In *De Vera*, supra (pg.795), defendant had a "policy of preventing future harm" (in litigation). Defendant had a "policy", "a procedure in place for reporting accidents by its drivers if only for its own benefit." Information from which they were called upon, by the passenger/plaintiff, to produce.

In the instant case, regarding pilot's announcement to passengers no mention was made of hurricane or hurricane warning, an act of deceit under *California Civil Code* 1710. Mexicana Airlines had, by their Flight Operations Manual ("Announcements to Passengers") (ER Vol.3, pg.80) a "policy", "a procedure in place" for announcing "storms," which they failed to do. The *De Vera* court states (pg. 795)(2d):

> "When we apply the relevant considerations of policy we find that they militate strongly in favor of a finding of duty."

Airline breached its duty of utmost care by breach of carriers "written policy," From *USAIR Inc. v. U.S. Dept. of Navy*, 14 F.3d 1410, 1414 (9th Cir. 1994):

> "The flight attendant's actions breached the common carrier's duty of utmost care, and were also in violation of USAIR's written policy regarding the duty to secure overhead luggage, as recorded in the flight attendant manual."

I. HURRICANE WARNINGS ARE ISSUED "FOR THE PROTECTION OF THE PUBLIC." AND ADEQUATE PROTECTION IS DEPENDANT UPON "TIMELY WARNINGS."

Hurricane warnings are for the purpose of notifying people of danger in order that they may protect themselves and their property. Hurricane warnings are for the "protection of the public." From *Proof of Facts*, Vol. 28, pg. 225, 226 (pub. 1972):

> "The National Weather service operates a hurricane warning system during hurricane season."
>
> "Adequate protection against the destructive forces of hurricanes depends largely on accurate and timely warnings."
>
> "The main function of this system...the preparation of forecasts and warnings, and the dissemination of such information, plus pertinent advice, to the public."
>
> "And after a hurricane warning has been posted...up-to-date information...concerning the storm...are issued every hour or as often as necessary for the protection of the public."

J. "FORESEEABLE PERIL" IS CREATED BY AIRLINE FLYING UNAWARE PASSENGERS INTO AREA UNDER HURRICANE WARNING.

Landing aircraft at Cancun Airport where weather at time of landing was at or above minimum for landing was discretionary, failure to warn unaware passengers of hurricane was not. The California Supreme Court said in *Johnson v. State*, 73 Cal.Rptr. 240, (1968):

> "Those who create foreseeable peril, not readily discoverable by endangered persons, have duty to warn endangered persons of such potential peril."

The court in *Johnson*, at pg. 250, cites several cases where certain acts are discretionary but failure to warn is not. Two are cited here:

"Decision as to where to place wire across canyon was assumed to be discretionary, but failure to warn pilot was not. *United States v. State of Washington*, (9th Cir. 1965) 351 F2d. 913, 916."

"Decision as to how and when and in what manner to conduct nuclear tests was discretionary, but failure to give proper notice was not. *Bulloch v. United States*, (D. Utah 1955) 133 F.Supp. 885, 889."

K. IN CALIFORNIA FAILURE OF CARRIER TO GIVE PASSENGERS NOTICE OF "PARTICULAR DANGER" ON JOURNEY IS NEGLIGENCE. PASSENGERS HAVE A RIGHT TO "CHOOSE" WHETHER THEY WILL "RUN THE RISK" OF "DANGER."

Plaintiff's right to decide for herself whether she wanted to fly into an area under hurricane warning is supported by *Dinnigan*, where stagecoach driver drove coach into a "...dangerous place and exposed passenger to peril," from *Dinnigan v. Peterson*, 3 Cal.App. 764, 767, 87 P. 218 (1906):

"...in not giving the passengers notice of the danger apparent, that an opportunity might be offered them to alight and avoid the same. His omission in this regard was negligence."

"Moreover, where the driver of a coach approaches a place of particular danger to passengers, he is bound to warn them of the nature of the danger, to the end that they may choose whether they will run the risk of it or not. (*Thompson's Carrier of Passengers*, p. 240.)"

"The care which defendant, as common carrier, owed to plaintiff was the utmost care." *Dinnigan*, supra at 767, citing *Treadwell v. Whittier*, 80 Cal. 588, 13

Am.St.Rep.175, 22 Pac. 266.

In comparing circumstances. In *Dinnigan*, the coach overturned and the passenger was injured. Plaintiff, in the instant case, was informed of the hurricane (while still under the care of the airline) by a newspaper reporter inside the destination terminal and was outside the terminal area when injured by the hurricane. In both cases passengers should have been warned prior to boarding or while on board the carrier's vehicle. In both cases danger was known to carriers and unknown to injured parties.

L. IN CALIFORNIA TOUR OPERATORS/WHOLESALERS CANNOT EXCULPATE THEMSELVES FROM CONTRACTS THAT INVOLVE THE "PUBLIC INTEREST." ALSO IN CALIFORNIA, NEGLIGENCE OF ONE PARTNER IS IMPUTED TO THE OTHER PARTNER. DEFENDANTS' KNEW PLAINTIFF'S CONTRACT FOR VACATION TO CANCUN WAS IMPOSSIBLE TO FULFILL.

At the time plaintiff departed on flight from Guadalajara defendants' Mexicana Airlines and Empire Tours knew plaintiff's contract for vacation in Cancun was impossible to fulfill as they had knowledge of the hurricane and hurricane warning. Not an ordinary hurricane, but a class five hurricane officially rated as "devastating." Purpose of the contract was for the enjoyment of a vacation. Both defendants' breached their contract with the plaintiff. A violation of *California Business and Professions Code* §17550.14, Failure to provide transportation or travel services.

In California sellers of travel cannot be allowed to exculpate themselves from contracts that involve the "public interest." The California Supreme Court ruled in *Tunkl v. Regents of University of California*, 32 Cal.Rptr. 33, 35 (1963):

> "The cases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.'"

Text of *Tunkl* (pg.36-38) outlines type of transaction in which exculpatory provisions will be held invalid. The Ninth Circuit Memorandum (App. pg. 6 & 7), in part, relied on Empire Tours' exculpatory provision. However, under *Tunkl*, that exculpatory provision (ER Vol.3, pg. 10) is invalid. Even stronger, *Tunkl* (pg. 34) cites "*California Civil Code* §1668. Certain contracts unlawful":

> "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

Empire Tours had knowledge of the hurricane (ER Vol. 3, pg. 85, Vol.2, No.211, pg. 21,25,26,31,32) and any negligence of one partner or agent of partnership is imputed to the other partner. *Buckley v. Chadwick*, 288 P.2d 12, 16; 45 Cal.2d 183, (1955). *Buckley* cites *California Civil Code* §1714. Also see Empire Tours/Mexicana Airlines joint tour brochure (ER Vol.3, pg.8 -10).

M. *TREATY* IS FOR THE "PUBLIC WELFARE" AND UNDER LAW OF *TREATY ON TOURISM* BETWEEN GOVERNMENTS OF THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES, MEXICANA AIRLINES AND EMPIRE TOURS ASSUMED, BY LAW, THE RESPONSIBILITY OF PROMOTING THE "HEALTH AND SAFETY" OF TOURISTS, AND TOURISTS "RIGHTS" ARE TO BE "RESPECTED." (*TIAS* 10821, App. pg. 27).

Treaty in force is for the purpose of developing tourism between the United States and Mexico. The Parties of the *Treaty* agreed by law to promote the "safety" of tourists and

that tourists "rights" are to be "respected." A treaty is defined as a "compact" between two or more independent nations with a "view to the public welfare," *B. Altman & Co. v. United States*, 224 U.S. 583, 32 S.Ct. 593,596 (1912).

The Parties of the *Treaty* agreed to apply applicable laws and regulations. *Treaty* states, "The Parties, subject to their laws..." (Art.1, No.2, App. pg.29). The *Treaty* is specifically addressed to "tour wholesalers and operators" and "airlines," among others (Art.1, No.2, App. pg.29). The *Treaty* states that tourists "rights" are to be "respected" and tourists are to be "extended all appropriate courtesies" (Art.2, No.4, App. pg.30). The *Treaty* also states:

> "Both Parties recognize the necessity of promoting ... the health and safety of tourists from the other country, whether traveling by automobile or any other means of transportation, ... " (Art.2, No.7, App. pg.31).

Special consideration is given to "joint marketing activities" involving "tour wholesalers" (Art.VI, No.1 & 2, App. pg.33). Mexicana Airlines/Empire Tours joint tour brochure (ER Vol.3, pg. 8) is evidence of the same "joint marketing" plan as outlined in the *Treaty*.

By this *Treaty* it is clear tourists "rights" are to be respected, and it is not the intent of the *Treaty* that uninformed tourists would be transported into dangerous areas under hurricane warning. This conduct is totally contrary to the *Treaty*. The *Treaty* is "binding" on both defendants as indicated in *Kennett v. Chambers*, 14 How. 38, 14 L.Ed. 316:

> "Treaties, while they remain in force, are by the *Constitution of the United States*, binding not only upon the government but upon every citizen."

It is apparent the intent of the *Treaty on Tourism* serves as a principle and a policy for airlines, tour operators

and others, to place the safety of tourists in a high priority as they are in a foreign country, away from home, in unfamiliar surroundings, and are therefore vulnerable and have a right to be warned of known dangers in the area of their travel.

Treaty on Tourism and *Treaty on Weather Stations* (exchange of weather information) were raised below but not addressed by the Ninth Circuit.

CONCLUSION

Suppliers of travel services are collectively a major industry in America and travelers should be confident those services are provided with safety. "The travel industry is second only to the oil business in generating revenues." From article, *Developments in Liability of Tour Operators and Travel Agents*, Thomas A. Dickerson, , New York Law Journal, August 23, 1990.

Passengers have a right to decide for themselves whether they want to fly to and be discharged into highly dangerous areas, and travel consumers have a right to receive services for which they contracted. This ongoing problem is reflected below by the California State Legislature in *California Business and Professions Code*, 1996 (Deering's) Pocket Supplement (in part):

> "**§17550. Legislative findings and declarations**
>
> The Legislature finds and declares that certain advertising, sales and business practices of travel promoters have worked financial hardship upon the people of this state; that the travel business has a significant impact upon the economy and well-being of this state and its people; that problems have arisen which are peculiar to the travel promoter business; and that the public welfare requires regulation of travel promoters in order to eliminate unfair advertising,

sales and business practices; to establish standards which will safeguard the people against financial hardship and to encourage competition, fair dealing and prosperity in the travel business."

In addition to issues outlined above, if petition is granted petitioner intends to reserve the following issues for possible argument in brief on merits: Theory of "immediate danger" not raised at trial, but initially raised by the Ninth Circuit; agency, no evidence Empire Tours was the agent, travel agent testified she was the "agent," jury could only answer "no" to jury verdict question and should not have been asked to believe there could be two agents; joint operation and liability for tour; misconduct of opposing counsel i.e., altering/rewriting case law and submitting it as proposed jury instructions that were eventually included in charge to jury, and District Court thereby instructing jury there was no duty to warn; Attorney injecting theory of "imminent danger" into attorney authored Findings of Fact and Conclusions of Law where this issue was not raised at trial.

Petitioner is currently in pro per and can not afford to hire an attorney for every phase of the case, however if petition is granted petitioner will have an attorney for oral argument.

For the reasons stated herein, petitioner requests the Court grant this Petition for Certiorari.

April 8, 1996
Date

Respectfully submitted,

Chris Brasseur
Petitioner, In Pro Per

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS BRASSEUR,

Plaintiff - Appellant,

v.

EMPIRE TRAVEL SERVICE, INC.; EMPIRE TOURS INCORP., a corporation; GIZELLE FREIDMAN, Individually and dba Empire Tours, COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; companies 1 through 25; and Does 1 through 100, inclusive; COMPANIA MEXICANA DE AVIACION, S.A.

Defendants - Appellees.

NO. 94-15905

D.C. No. CV-89-03826-CAL

Memorandum*

(Filed Dec. 15, 1995)

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted November 15, 1995
San Francisco, California

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER**, Senior District Judge.

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* / ** Footnotes on following page.

Chris Brasseur appeals from the judgement entered in favor of Compania de Aviacion ("Mexicana"), Empire Travel Service, Inc. and Empire Tours (jointly "Empire Travel").

Brasseur contends that: (1) the district court erred in applying an "ordinary" standard of care to Mexicana's conduct; (2) the district court's findings were unsupported by the evidence; (3) the district court erred in instructing the jury to determine whether Empire Travel was Brasseur's agent; (4) the district court abused its discretion by giving misleading jury instructions; and (5) the district court erred in granting Empire Travel's motion for judgement as a matter of law. We affirm.

I

Brasseur contends that the district court, sitting as the trier of fact, applied the incorrect standard of care to Mexicana's conduct. She argues that Mexicana, as her carrier, owed a heightened duty of care that it violated when it discharged her in Cancun after hurricane warnings had been issued for the area, and failed to warn her of the approaching hurricane. Vollendorff v. United States, 951 F.2d 215 217 (9th Cir. 1991).

It is well established that a carrier owes a passenger "the highest degree of care." Marshall v. United Airlines, 110 Cal. Rptr. 416, (Cal. Ct. App. 1973). "This rule applies while the passengers are in transitu, and until they have

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this district except as provided by 9th Cir. R. 36-3.

** Honorable Owen M. Panner, Senior United States District Judge, for the District of Oregon, sitting by designation.

safely departed from the carriers vehicle." Id. "[U]ntil the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger the rule of utmost care and diligence ... still applies." Id. at 419 (quoting Brandelius v. City & County of San Francisco, 306 P.2d 432, 436 (Cal. 1957). The rationale for this heightened standard of care is that during travel a passenger is exposed to numerous hazards while his or her freedom of movement is entirely under the control of the carrier. Orr v. Pacific Southwest Airlines, 257 Cal Rptr. 18, 21 (Cal. Ct. App. 1989). This duty of care does not end absolutely when the passenger alights from carriage. Parker v. City & County of San Francisco, 323 P.2d 108, 112 - 13 (Cal. Dist. Ct. App. 1958) (railway liable for discharging passenger into unsafe street). However, once the passenger is discharged into a relatively safe space, the hazards incident to the journey, as well as the carrier's control over the passenger, cease to exist. Any subsequent duty of care owed by the carrier is thus no greater than that of ordinary care or reasonable care. Orr, 257 Cal. Rptr. at 21.

This court has recognized that a common carrier's duty of care may include warning the passenger of reasonably foreseeable risks that may be encountered during transportation or at the terminus. Rookard v. Mexicoach, 680 F.2d 1257, 1260 (9th Cir. 1982) (citing Fleming v. Delta Airlines, 359 F. Supp. 339, 341 (S.D.N.Y. 1973) (duty to inform passengers of previously forecast turbulence); Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326, 332 (5th Cir. 1959) (duty to warn black couple of risk of assault on bus traveling through the Sough); Werndli v. Greyhound Corp., 365 So. 2d 177, 178 (Fla. Dist. Ct. App. 1978) (duty to warn passenger that she would be discharged at closed, locked and darkened terminal). Like the carrier's heightened duty to protect passengers, the carrier's duty to warn terminates once the passenger is discharged into a relatively safe space. See Rookard, 680

F.2d at 1260 (no duty to warn plaintiffs of dangers they might encounter after discharged from bus).

Brasseur does not contend that she was exposed to danger during the flight, the landing of the airplane, or in disembarking. Rather, Brasseur contends that the airline breached its duty to her be discharging her into "unsafe surroundings" by leaving her at Cancun airport after hurricane warnings had been issued for the area. We disagree. When the airplane landed, there was no rain or storm within twenty miles of the airport. Once the airline delivered Brasseur to the cancun airport safely, its heightened duty as a carrier ceased. Because the hurricane did not present a risk to Brasseur's safety either during her flight, or when she disembarked, Mexicana had no duty to warn her that a hurricane might hit the following day.

Brasseur argues that the district court's finding that she was not in immediate danger from the hurricane when she arrived at the Cancun airport is not supported by the evidence. A district court's findings of fact are reviewed for clear error. Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995).

Viewed in a light most favorable to Mexicana, the evidence amply supports the district court's finding that Brasseur was not in immediate danger upon her arrival in Cancun. See *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251, 253 (9th Cir. 1991) (in applying the clearly erroneous standard of review, an appellate court views evidence in the light most favorable to the party who prevailed at trial). Captain Olea testified that he had reviewed weather reports and determined that the conditions would be safe for landing at the estimated time of arrival in Cancun. The reports reflected that the center of Hurricane Gilbert was more than 300 miles east-southeast of Cancun at the time the flight departed from Guadalajara and when the flight landed in Cancun. Captain Olea further testified that there was no rain or storm within 20 miles of the airport at the

time the flight landed. The record shows that the eye of the hurricane did not pass Cancun until 5:00 a.m. the following morning. This evidence demonstrates that Brasseur was not in immediate danger when Mexicana discharged her at the Cancun airport.

Brasseur further asserts, without supporting argument, that Mexicana owed her duties of fiduciary, committed breach of contract, and committed fraud and deceit by omitting hurricane storm warnings from its passenger announcements. We have examined these claims. They find no support in the record.

II

Brasseur maintains that the district court erred in instructing the jury that it must find that Empire Travel was not an agent of Brasseur in order to find liability for any acts or omissions of Empire Travel. Brasseur further contends that the district court erred by "giving numerous jury instructions regarding Empire [Travel's] duty which were either misleading or contrary to applicable law." Empire Travel argues that we should not reach the merits of Brasseur's contentions because she waived any objection to the district court's instructions by not objecting at trial.

Rule 51 of the federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." "Rule 51 is designed to bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials." Bertrand v. Southern Pacific Co., 282 F.2d 569, 572 (9th Cir. 1960). To further this purpose, this court has ruled that there is no "plain error" exception in civil cases. Glover v. Bic Corp., 6 F.3d 1318, 1326 (9th Cir. 1993); Bertrand, 282 F.2d at 572.

Because Brasseur failed to object before the district court, she is precluded from attacking the instructions in this appeal. In United States v. Parsons Corp., this court recognized that Rule 51 also requires a party to object to errors in a special verdict form before the jury retires. 1 F.3d 944, 945 (9th Cir. 1993).

Brasseur asserts that the district court erred in granting judgement as a matter of law in favor of Empire Travel on her breach of contract claim[1]. We review de novo the district court's grant of judgement as a matter of law. Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994). We view the evidence in a light most favorable to the moving party, and draw all reasonable inference in its favor. Id.

Brasseur contends that the vacation package she purchased from Empire Travel created a contractual relationship with her. She argues that Empire Travel's brochure and the travel vouchers issued to her are evidence of that contract. She further claims that Empire Travel breached this contract by its unjustified failure to provide her with safe accommodations at the Cancun hotel specified in the voucher, and by falsely representing that she would enjoy "gentle" winds.

Empire Travel does not dispute that the travel package constituted a contract. Rather, it argues that Brasseur would have received all that she bargained for, but for the storm, which forced the evacuation of the quests at the hotel designated in the brochure.

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1 Brasseur also asserts that the district court erred in refusing to submit to the jury her claims of intentional infliction of emotional distress and fraud. She presets no argument to support this contention. We do not review assertions that are not supported by argument. United States v. Loya, 807 F.2d 1483, 1486 - 87 (9th Cir. 1987).

Under California law an unforeseen cause over which the promisor has no control will not excuse performance of a contract, unless the parties have provided for such contingencies in their contract. Caron v. Oliver, 284 P.2d 544, 547 (Cal. Ct. App. 1995). The brochure which Brasseur received from Empire Travel expressly provides that Empire Travel is not responsible for any "claims, losses, damages, costs of expenses arising out of injury ... inconvenience, loss of enjoyment, upset, disap-pointment, distress or frustration, whether physical or mental resulting from ... weather or other factors beyond our control." This contract provision excuses Empire Travel's failure to deliver the promised hotel. Likewise, it precludes Brasseur from recovering for any loss of enjoyment due to the lack of gentle winds.

Empire Travel's brochure and vouchers further provide that any services not used by a traveler are not refundable unless Empire Travel completely cancels the trip. This provision precluded Brasseur from recovering damages for the nights she was forced to sleep on the floor of a hotel lobby.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS BRASSEUR,

Plaintiff - Appellant,

v.

EMPIRE TRAVEL SERVICE, INC.; EMPIRE TOURS INCORP., a corporation; GIZELLE FREIDMAN, Individually and dba Empire Tours, COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; companies 1 through 25; and Does 1 through 100, inclusive; COMPANIA MEXICANA DE AVIACION, S.A.

Defendants - Appellees.

NO. 94-15905

D.C. No. CV-89-03826-CAL

Order

(Filed Feb. 29, 1996)

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER*, Senior District Judge.

Appellant's motion for reconsideration is DENIED.

---

* Honorable Owen M. Panner, Senior United States District Judge, for the District of Oregon, sitting by designation.

Office of the Clerk
UNITED STATES DISTRICT COURT
Northern District of California

Richard W. Wieking
Clerk

450 Golden Gate Avenue
San Francisco, CA 94102
(415) 522-2000

February 28, 1996

CASE NUMBER: C-89-3826-CAL
CASE TITLE: Chris Brasseur v. Empire Travel Service, Inc., et al.

DATE MANDATE FILED: February 26, 1996

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Sincerely,

RICHARD W. WIEKING, Clerk

by: Thelma M. Nudo
Deputy Clerk

Distribution: CIVIL - Counsel of Record

CRIMINAL - Counsel of Record
U.S. Marshal (Copy of Mandate)
U.S. Probation Office

NDC App-16
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(Filed
Feb. 28, 1996)
(stamped)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS BRASSEUR,

Plaintiff - Appellant,

v.

EMPIRE TRAVEL SERVICE, INC.; EMPIRE TOURS INCORP., a corporation; GIZELLE FREIDMAN, Individually and dba Empire Tours, COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; companies 1 through 25; and Does 1 through 100, inclusive; COMPANIA MEXICANA DE AVIACION, S.A.

Defendants - Appellees.

NO. 94-15905

D.C. No. CV-89-03826-CAL

Judgement

(Filed Feb. 26, 1996)

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 15, 1995.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS BRASSEUR,

Plaintiff - Appellant,

v.

EMPIRE TRAVEL SERVICE, INC.; EMPIRE TOURS INCORP., a corporation; GIZELLE FREIDMAN, Individually and dba Empire Tours, COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; companies 1 through 25; and Does 1 through 100, inclusive; COMPANIA MEXICANA DE AVIACION, S.A.

Defendants - Appellees.

NO. 94-15905

D.C. No. CV-89-03826-CAL

Order

(Filed Feb. 20, 1996)

ALARCON, Circuit Judge

Appellant's motion for stay of mandate pending petition for writ of certiorari is DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS BRASSEUR,

Plaintiff - Appellant,

v.

EMPIRE TRAVEL SERVICE, INC.; EMPIRE TOURS INCORP., a corporation; GIZELLE FREIDMAN, Individually and dba Empire Tours, COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; companies 1 through 25; and Does 1 through 100, inclusive; COMPANIA MEXICANA DE AVIACION, S.A.

Defendants - Appellees.

NO. 94-15905

D.C. No. CV-89-03826-CAL

Order

(Filed Feb. 9, 1996)

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER*, Senior District Judge.

Appellant's January 29, 1996, motion for leave to file an addendum of additional facts to the petition for hearing and suggestion for rehearing en banc is DENIED.

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* Honorable Owen M. Panner, Senior United States District Judge, for the District of Oregon, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS BRASSEUR,

Plaintiff - Appellant,

v.

EMPIRE TRAVEL SERVICE, INC.; EMPIRE TOURS INCORP., a corporation; GIZELLE FREIDMAN, Individually and dba Empire Tours, COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; companies 1 through 25; and Does 1 through 100, inclusive; COMPANIA MEXICANA DE AVIACION, S.A.

Defendants - Appellees.

NO. 94-15905

D.C. No. CV-89-03826-CAL

Order

(Filed Feb. 2, 1996)

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER*, Senior District Judge.

The panel as constituted above has voted unanimously to deny the petition for rehearing. Judge Schroeder has voted to reject the suggestion for rehearing en banc. Judge Alarcon and Panner recommended the rejection of the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* Honorable Owen M. Panner, Senior United States District Judge, for the District of Oregon, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRIS BRASSEUR,

Plaintiff - Appellant,

v.

EMPIRE TRAVEL SERVICE, INC.; EMPIRE TOURS INCORP., a corporation; GIZELLE FREIDMAN, Individually and dba Empire Tours, COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; companies 1 through 25; and Does 1 through 100, inclusive; COMPANIA MEXICANA DE AVIACION, S.A.

Defendants - Appellees.

NO. 94-15905

D.C. No. CV-89-03826-CAL

Order

(Filed Feb. 1, 1996)

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER*, Senior District Judge.

Appellant's January 16, 1996, motion for leave of the court to modify title of petition for rehearing en banc is GRANTED.

Appellant's January 16, 1996, motion for leave of the court to file addendum to petition for rehearing and rehearing en banc is DENIED. The court cannot consider arguments raised for the first time in a petition for rehearing.

Appellant's January 23, 1996, motion for leave of the court to file addendum to petition for rehearing and rehearing en banc is DENIED.

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* Honorable Owen M. Panner, Senior United States District Judge, for the District of Oregon, sitting by designation.

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Attorneys for Defendant
COMPANIA MEXICANA DE AVIACION, S.A.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH OARE and CHRIS BRASSEUR,

Plaintiffs,

vs.

EMPIRE TRAVEL SERVICE, INC., a corporation; EMPIRE TOURS INCORPORATED, a corporation; GIZELLE FRIEDMAN, individually and doing business as EMPIRE TOURS; COMPANIA MEXICANA DE AVIACION, S.A. a foreign corporation; COMPANIES 1 through 25; and DOES 1 through 100, inclusive,

Defendants.

CASE NO.
C89 3826CAL

Findings of Fact and Conclusions of Law
(ER Vol. 2, No.184)

This action against Mexicana came on for trial before

the Court and an advisory jury, Honorable Charles A. Legge, District Judge, presiding, and the issues having been duly tried, the Court makes the following Findings of Fact and Conclusions of Law:

1. Plaintiff Chris Brasseur (hereinafter "plaintiff") purchased a travel package that included passenger coupons for air transportation by Compania Mexicana de Aviacion, S.A. (hereinafter "Mexicana") from San Francisco, California; to Puerto Vallarta, Mexico; to Cancun, Mexico with an intermediate stop in Guadalajara, Mexico; and return to San Francisco, California.

2. Plaintiff flew on a Mexicana flight from Puerto Vallarta to Guadalajara on the morning of September 13, 1988.

3. Plaintiff had a layover of approximately three and one-half hours in Guadalajara between flights.

4. Plaintiff departed Guadalajara for Cancun at 1:40 p.m. on Mexicana Flight 943 on September 13, 1988 (all times are Central Standard Time unless otherwise noted).

5. Guillermo Colin was dispatcher and station manager for Mexicana at Guadalajara on September 13, 1988.

6. Mr. Colin was licensed as a dispatcher in 1972.

7. Mr. Colin had been reviewing weather reports regarding the Caribbean on a daily basis since 1972 while performing his duties as a dispatcher for Mexicana.

8. Captain Ricardo Olea was the pilot in command for Flight 943 from Guadalajara to Cancun on September 13, 1988.

9. Captain Olea was fully licensed to perform as a pilot in command for commercial aircraft.

10. Captain Olea had approximately 8,000 total pilot hours as of September 13, 1988.

11. Captain Olea and Mr. Colin reviewed weather reports and determined that the forecast weather for Cancun indicated that the conditions would be safe for landing at the estimated time of arrival of Flight 943 in Cancun.

12. Captain Olea and Mr. Colin determined from their review of the weather reports that the center of Hurricane Gilbert was more than 300 miles east southeast of Cancun at 1:40 p.m. on September 13, 1988 and that the hurricane was forecast to remain more than 300 miles east southeast of Cancun until after Flight 943 landed at Cancun.

13. Mr. Colin had been an employee of Mexicana Airlines for over seventeen years on September 13, 1988 and stated that he was not aware of any prior hurricanes that had struck Cancun.

14. Captain Olea had been flying for Mexicana Airlines in the Caribbean area for over twelve years and stated that he was unaware of any prior hurricanes that had struck Cancun.

15. Mr. Colin stated that Hurricane Gilbert was too far from Cancun at the time of departure of Flight 943 from Guadalajara for him to give a warning to the passengers that there was a risk that Hurricane Gilbert might strike Cancun, that based on his seventeen years of experience in observing hurricanes in the Caribbean, the hurricanes did not follow a path that led through Cancun, and that he did not believe that Cancun would be in danger from Hurricane Gilbert.

16. Mr. Colin stated that he would have warned the passengers of the risk of a hurricane if Hurricane Gilbert had been within 150 miles of Cancun.

17. Mr. Colin did not believe that the passengers on Flight 943 would be in any imminent danger from Hurricane Gilbert after their arrival at Cancun.

18. Prior to September 1988, Mr. Colin attended monthly meetings with the station managers of all the airlines operating out of Guadalajara.

19. The subject of hurricanes in the Caribbean and giving hurricane warnings to passengers was discussed at the meetings attended by the station managers.

20. Mr. Colin learned from the meetings of the station managers that the other airlines did not give hurricane warnings to their passengers unless it appeared the passengers would be in imminent danger from the hurricane upon arrival at their destination.

21. At the time Flight 943 departed Guadalajara for Cancun, plaintiff was not in imminent danger from Hurricane Gilbert after her arrival in Cancun.

22. Captain Olea advised the passengers on Flight 943 just prior to landing that the weather in Cancun was 82 degrees and cloudy.

23. Weather given to the passengers on Flight 943 was correct weather for Cancun at the time the flight landed.

24. Mexicana's operations manual does not require the captains of their aircraft to advise passengers of possible adverse weather conditions that may occur at a destination some time after the flight has landed.

25. Flight 943 made a safe and uneventful landing in Cancun at 4:05 p.m. on September 13, 1988.

26. The center of Hurricane Gilbert was approximately 300 miles east southeast of Cancun at 4:05 p.m. on September 13, 1988.

27. Two flights from other airlines and one Mexicana flight landed at Cancun after Flight 943 landed on September 13, 1988, and the flights were carrying passengers into Cancun.

28. The Cancun Airport remained open until 8:00 p.m. on September 13, 1988.

29. Cancun was struck by hurricane force winds during the morning hours of September 14, 1988.

30. The Court finds that Mexicana had no duty to warn plaintiff of a risk of a hurricane under the facts and circumstances presented.

31. The Court finds that Mexicana did not breach any duty it may have owed plaintiff which caused injury to plaintiff.

32. The Court finds that Mexicana fulfilled all terms of its contract of transportation with plaintiff.

33. The Court finds that there was no outrageous conduct by Mexicana and there was no intent to cause emotional distress.

34. The Court finds that Mexicana did not conceal or suppress a material fact that it had a duty to disclose to plaintiff.

35. The Court finds that Mexicana did not intentionally conceal or suppress a material fact with intent

to defraud plaintiff.

To the extent that the preceding findings of fact may be deemed to be conclusions of law, they are hereby incorporated by reference into the conclusions of law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this case against Mexicana pursuant to the Foreign Sovereign Immunities Act. 28 U.S.C. 1330 and 1602 et. seq.

2. The Court finds that plaintiff was not in any imminent danger from Hurricane Gilbert at the time Flight 943 landed in Cancun on September 13, 1988.

3. The Court finds that Mexicana exercised reasonable care in determining that it was not necessary to warn plaintiff of a risk of a hurricane at the time it flew plaintiff to Cancun.

4. The Standard employed by Mr. Colin that a warning of a hurricane risk would be issued to the passengers if a hurricane were within 150 miles of Cancun was a reasonable standard.

5. There was no evidence that other airlines operating into Cancun on September 13, 1988 warned their passengers of the risk of a hurricane.

6. There was no evidence that it was an industry practice or standard in the airline industry to warn passengers of a hurricane risk.

7. There was evidence that the airlines do not warn passengers of hurricanes unless it appears that the passengers will be in imminent danger from the hurricane after their arrival at the destination.

8. The Court finds that Mexicana had no duty to warn plaintiff of the risk of a hurricane under the facts and circumstances presented.

9. The Court finds that Mexicana did not breach any duty it may have owed plaintiff which caused injury to plaintiff.

10. The Court finds that Mexicana fulfilled all terms of its contract of transportation with plaintiff.

11. The Court finds that there was no outrageous conduct by Mexicana and there was no intent to cause emotional distress.

12. The Court finds that Mexicana did not conceal or suppress a material fact that it had a duty to disclose to plaintiff.

13. The Court finds that Mexicana did not intentionally conceal or suppress a material fact with intent to defraud plaintiff.

To the extent that the proceeding conclusions of law may be deemed to be findings of fact, they are hereby incorporated by reference into the findings of fact.

Dated: January 25, 1994

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

CHARGE TO ADVISORY JURY
REGARDING MEXICANA AIRLINES
(ER Vol. 1, No.175, pg. 55 & 56)

All right. Now, separate and apart from Empire, question number three directs your attention to Mexicana. And question number three is as follows: Was defendant Mexicana negligent in not warning plaintiffs of a risk of a hurricane in Cancun at the time Defendant Mexicana flew Plaintiffs there?

You will again see that the standard that you have to decide there is the issue of negligence. Was Mexicana negligent? So I'm going to again repeat what "negligent" means -- "negligent" means.

Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do when prompted by considerations which ordinarily regulate the conduct of human affairs.

It is in other words, failure to use ordinary care under the circumstances. Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or to the persons or property of others.

Ordinary care is not an absolute term. It's a relative one. That is to say in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence in the case.

And because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required in the use of ordinary care will vary with the nature of what is being

done and all the surrounding circumstances shown by the evidence.

To put it another way, any increase in the foreseeable danger requires increased care.

All right. That is the decision which you have to make in question number three dealing with Mexicana.

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89-497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)

"... the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence ... of the treaties, international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

TREATIES AND OTHER INTERNATIONAL ACTS
SERIES 10821

TOURISM

**Agreement Between the
United States of America
and Mexico**

Signed at Mexico April 18, 1983

MEXICO

Tourism

*Agreement signed at Mexico April 18, 1983;
Entered into force January 25, 1984.*

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES ON THE DEVELOPMENT AND FACILITATION OF TOURISM

Considering the sharing of an extended border and their close neighborly relations;

Recognizing the cordial and friendly interest expressed by President Ronald Reagan and President Miguel de la Madrid in San Diego;

Believing that international cooperation and economic exchange should serve to foster man's development, to enhance mutual respect for human dignity, and to promote shared well being;

Convinced that tourism, because of its socio-cultural and economic dynamics, is an excellent instrument for promoting understanding, goodwill, and close relations between people;

Noting that a valuable structure for tourism, already existing between both countries, stands ready for further development;

The Government of the United States of America and of the United Mexican States agree to conclude a Tourism Agreement which, within their respective legal framework, will promote objectives inspired in the following provisions:

ARTICLE I
Development of the Tourism Industry and Infrastructure

1. The parties will facilitate, within their respective territories, the operation by the other Party of official travel promotion offices.

2. The Parties, subject to their laws, will facilitate and encourage the activities of travel agents, tour wholesalers and operators, hotel chains, airlines, railroads, motor coach operators, steamship companies generating two-way tourism between their countries.

3. Each party will;

a. Permit air, sea and surface carriers of the other Party, whether public or private, to appoint sales representatives in its territory in order to market their services;

b. Encourage the carriers of the other Party to develop and promote, through designated and authorized sales outlets in its territory, special or excursion fares designed to encourage reciprocal tourist travel;

c. Permit the sale of promotional railway tickets by carriers of the other Party through appropriate outlets in its territory;

d. Expedite, to the extent possible, the award to carriers of new air routes established under the bilateral Air Transport Agreement[1] signed by both countries.

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1. Done Aug. 15, 1960. TIAS 4675, 7167; 12 UST 60; 22 UST 1492.

4. To the extent that either Party is subject to statutes imposing duty on the entrance of ticket stock or sales materials of the carriers or tourism enterprises of the other, that Party shall review those statutes with the objective of providing for the eventual duty-free entry of such materials on a reciprocal basis.

ARTICLE II
Facilitation and Documentation

1. The Parties will endeavor to facilitate travel of tourists into both countries by simplifying and eliminating, as appropriate, procedural and documentary requirements.

2. Each Party shall facilitate, to the extent permitted by its laws, the entry of performers who (a) are nationals of the other Party, and (b) have been invited to participate in international cultural events to be held in its territory in the border region. Each Party shall take all necessary facilitative measures to encourage binational cultural events which would strengthen ties and promote tourism in the border region.

3. The Parties will consult on the opening of additional border crossing points and on the designation of such points as high priority based on the needs of tourist development of each area.

4. The Parties will encourage the training of personnel at ports of entry and elsewhere within their respective territories so that tourists' rights are respected and tourists of both countries are extended all appropriate courtesies.

5. The Parties shall consider, on the basis of reciprocity, and on official request, waiving applicable visa fees for the entry and exit of teachers of and experts in tourism.

6. Aware of the importance of automobile collision and liability coverage to automobile tourism between the two countries, the Parties agree to publicize the automobile insurance requirements of their respective territories in the territory fo the other, either by distributing information through their respective national tourist offices or by other appropriate means, in accordance with applicable repudiations in each country.

7. Both Parties recognize the necessity of promoting, within their respective capabilities and administrative faculties, the health and safety of tourists from the other country, whether traveling by automobile or any other means of transportation, and will either provide information about available medical services or encourage other organizations or agencies to do so as needed.

ARTICLE III
Border, Cultural and Tourism Programs

1. The Parties regard it appropriate to encourage tourist and cultural activities designed to strengthen the ties between the peoples of the border area, and to improve the overall quality of life of the inhabitants of both countries, and will consider exchange programs which are consistent with the cultural heritage of each country, facilitate the exchange of ideas and human experience, and convert this region into an attractive zone for visitors.

2. The Parties will consider it a priority to promote travel to developing regions which contain examples of the native culture of each country, and to develop and improve tourist facilities and attractions in those areas.

3. The Parties will encourage the balanced and objective presentation of their respective historic and socio-cultural heritage and promote respect for human dignity and conservation of cultural, archaeological, and ecological resources.

4. The Parties will exchange information concerning the use of facilities for shows and exhibits in their countries.

ARTICLE IV
Tourism Training

1. The Parties consider it desirable to encourage their respective experts to exchange technical information and/or documents in the following fields;

a. Systems and methods to prepare teachers and instructors on technical matters, particularly with regard to hotel operation and administration;

b. Scholarship for teachers, instructors, and students;

c. Curricula and study programs to train personnel who provide tourism services;

d. Curricula and study programs for hotel schools.

2. Each Party will encourage their respective students and professors of tourism to take advantage of fellowships offered by coileges, universities, and training centers of the other.

ARTICLE V
Tourism Statistics

1. Both Parties will do what is possible to improve the reliability and compatibility of statistics on tourism between the two countries, in both the border and interior regions.

2. The Parties agree to re-establish a technical committee on tourism statistics in which the appropriate agencies of both countries shall participate.

3. The committee shall address itself to the exchange and reconciliation of statistical data measuring tourism between the two countries and to the improvement of methods of collecting such data.

4. The Parties consider it desirable to exchange information on the size and characteristics of the actual and potential tourism markets in their two countries.

5. The Parties agree that the guidelines on the collection and presentation of domestic and international tourism statistics established by the World Tourism Organization shall constitute the requirements for such a data base.

Article VI
Marketing of Tourism

1. Subject of budgetry limitations, the Parties shall consider the conduct of joint marketing activities in other countries.

2. Activities which shall receive consideration include joint operation of inspection trips for tour wholesalers and operators, and journalists from third countries, film festivals, travel trade shows and travel missions.

Article VII
World Tourism Organization

1. The Parties shall work within the World Tourism Organization to develop, and encourage the adoption of, uniform standards and recommended practices which, if applied by governments, would facilitate tourism.

2. The Parties shall assist one another in matters of cooperation and effective participation in the World Tourism Organization.

ARTICLE VIII
Consultations

1. The Parties agree that tourism and tourism matters shall be discussed, as appropriate, in bilateral consultations attended by representatives of their official tourism organizations. These meetings shall occur periodically and at sites which shall alternate between the two countries.

2. Whenever possible these consultations will be held in conjunction with related meetings of the United States of America and the United Mexican States. Both Parties will consider the possibility of establishing working groups to consider specific issues or articles of the Agreement.

3. The United States of America designates the U.S. Department of Commerce as its agency with primary responsibility for implementing this agreement for the United States.

4. The United States designates the Tourism Secretariat as its agency with primary responsibility for implementing this agreement for Mexico.

ARTICLE IX
Tourism Agreement of 1978 Superceded

This agreement shall supercede and replace the Tourism Agreement between the Parties, signed May 4th, 978.[1]

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1. TIAS 9468; 30 UST 4443

ARTICLE X
Period of Effectiveness

1. Each Party shall inform the other by way of diplomatic note of the completion of necessary legal requirements in its country for entry into force of the present Agreement. The Agreement shall enter into force upon receipt of such notification by the second Party.[1]

2. Upon entry into force, this agreement shall be valid for a period of five years and will be renewed automatically for additional periods of five years unless either Party expresses objection in writing, through diplomatic channels three months prior to the expiration date.

3. The Agreement shall be terminated by either of the Parties ninety days after the Party transmits written notice of intention to terminate to the other Party.

ARTICLE XI
Notification

After entry into force, both Parties agree to notify the Secretariat General of the World Tourism Organization of this Agreement and any subsequent amendments.

Done at Mexico City this eighteenth day of April 1983 in two originals in the English and Spanish languages, both texts being equally authentic.

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1. Jan. 24, 1984

FOR THE GOVERNMENT OF THE UNITED STATES

George Shultz
Secretary of State

Malcolm Baldrige
Secretary of Commerce

FOR THE GOVERNMENT OF THE UNITED MEXICAN STATES

Bernardo Sepulveda Amor
Sec. of Foreign Relations

Antonio Enriques Savignac
Secretary of Tourism

UNITED STATES DEPARTMENT OF STATE

Treaties in Force

A List of Treaties and Other International Agreements of the United States in Force on January 1, 1990

MEXICO

Agreement on the development and facilitation of tourism. Signed at Mexico April 18, 1983; entered into force January 17, 1984.
TIAS 10821.

Department of State Publication 9433
Office of the Legal Advisor

Released June 1990